Director of Forests, Sarawak & Anor v Balare Jabu & Ors (suing on behalf of themselves and all other proprietors, occupiers, holders and claimants of native customary rights land (NCR) at and around Long Lamai, Ulu Baram, Sarawak) and another appeal

FEDERAL COURT (KUCHING) — CIVIL APPEAL NOS 02(i)-50 OF 2011(Q) AND 02–56–09 OF 2011(Q)
ARIFFIN ZAKARIA CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH AND SARAWAK) AND ABDULL HAMID EMBONG FCJ
2 OCTOBER 2012

Land Law — Customary land — Claim of — Respondents filed action for declaratory reliefs including for native customary rights and nullity of issuance of timber license — Appellants applied to strike out respondents' action — Whether defence of limitation under s 2 of the Public Authority Protection Act 1948 and/or Limitation Ordinance of Sarawak, was an answer to suit, action, or proceedings for declaration or declaratory orders — Whether respondents' action statute-barred

Limitation — Public authorities — Continuation of injury or damage — Respondents filed action for declaratory reliefs including for native customary rights and nullity of issuance of timber license — Whether defence of limitation under s 2 of the Public Authority Protection Act 1948 and/or Limitation Ordinance of Sarawak, was answer to suit, action, or proceedings for declaration or declaratory orders — Whether respondents' action statute-barred — Limitation Ordinance of Sarawak — Public Authority Protection Act 1948 s 2(a)

The respondents in the High Court had filed an action for declaratory reliefs including: a claim of native customary rights ('NCR') over an area of land in Miri, Sarawak; and a claim that the issuance of a timber license by the first and second appellants in Appeal 1 in favour of the appellant in Appeal 2 was null and void. The appellants then filed an application under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') to strike out the respondents' action premised on limitation. The High Court judge allowed the appellants' application and held that the Public Authority Protection Act 1948 ('the PAPA') and the Limitation Ordinance of Sarawak ('the Ordinance') had barred the respondents' claim. The learned judge further held that although the license was granted in 1992, the respondents were aware of the existence of the license and the alleged trespass as early as 1995. Yet action was only commenced in 2007 and no explanation was given for the delay. On appeal, the Court of Appeal reversed the High Court's decision and held that although

limitation might be a complete answer to a suit for remedy, it was not an answer to suit for declaratory relief. In the present appeals before the Federal Court, the question posed was whether the defence of limitation under s 2 of the PAPA and/or the Ordinance, was an answer to a suit, action, or proceedings for declaration or declaratory orders. In relation to this question, the court also considered the issue of whether the respondents' action was statute-barred. On top of the issue raised, the appellant in Appeal 2 submitted that they had not been exercising its rights conferred by the license for the preceding years and therefore the injury or damage, if any, could not be said to be continuous ('the appellant's argument').

Held, dismissing the appeals:

(1) In the present case, the second limb of s 2(a) of the PAPA should apply, namely, being 'the case of a continuance of injury or damage' because based on the uncontroverted facts, in particular the fact that in the license granted, it was clearly stated that the date of issue was on 30 March 1992 while the date of expiry was on 29 March 2012. Therefore, the license was still valid at the time the action was filed (see para 10).

(2) As long as the license remained valid, it continued to be subject to the respondents' NCR, if any, and rights in respect of the land concerned. Accordingly, the second limb of s 2(a) applied, being a continuing injury or damage upon the NCR and rights of the respondents. The respondents' action was therefore well within time since time would only begin to run from 30 March 2012 (see para 12).

(3) The appellant's argument ought to be brought up at trial and not be a ground for summary disposal in the absence of any strong evidence to substantiate the same. In other words, it was a triable issue to be determined. Further, the claim to the NCR land by the respondents disclosed a cause of action that should be determined by a full trial (see para 13).

(4) As long as the license remained valid, there was always a threat to the respondents' NCR and rights thereby entitling them to a valid cause of action premised on the second limb of s 2(a) of the PAPA (see para 14).

[Bahasa Malaysia summary

Responden di Mahkamah Tinggi telah memfailkan tindakan untuk relif-relif pengisytiharan termasuk: tuntutan hak adat anak negeri ('HAN') di atas kawasan tanah di Miri, Sarawak; dan tuntutan bahawa pengeluaran lesen kayu oleh perayu pertama dan kedua dalam Rayuan 1 yang memihak kepada perayu dalam Rayuan 2 adalah batal dan tidak sah. Perayu kemudian memfailkan permohonan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KKMT') untuk membatalkan tindakan responden yang didasarkan pada had masa. Hakim Mahkamah Tinggi membenarkan permohonan perayu dan

memutuskan bahawa Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPBA') dan Ordinan Had Masa Sarawak ('Ordinan') telah menghalang tuntutan responden. Hakim yang bijaksana selanjutnya berpendapat bahawa walaupun lesen tersebut diberikan pada tahun 1992, responden menyedari kewujudan lesen dan pencerobohan tersebut pada awal tahun 1995. Tetapi tindakan hanya dimulakan pada tahun 2007 dan tidak ada penjelasan untuk kelewatan itu. Atas rayuan, Mahkamah Rayuan membatalkan keputusan Mahkamah Tinggi dan berpendapat bahawa walaupun had masa mungkin merupakan jawapan yang lengkap bagi tuntutan untuk remedi, namun, ia bukan merupakan jawapan yang sesuai untuk relif pengisytiharan. Dalam rayuan semasa di hadapan Mahkamah Persekutuan, persoalan yang diajukan ialah sama ada pembelaan had masa di bawah s 2 APPBA dan/atau Ordinan, adalah jawapan kepada saman, tuntutan, atau prosiding bagi pengisytiharan atau perintah pengisytiharan. Berhubung dengan persoalan ini, mahkamah juga mempertimbangkan isu sama ada tindakan responden adalah dihalang oleh undang-undang. Selain daripada isu yang dibangkitkan di atas, perayu dalam Rayuan 2 berhujah bahawa mereka tidak menjalankan hak yang diberikan oleh lesen tersebut untuk tahun-tahun sebelumnya dan oleh itu kecederaan atau kerosakan, jika ada, tidak boleh dikatakan sebagai berterusan ('hujahan perayu').

Diputuskan, menolak rayuan-rayuan:

(1) Dalam kes semasa, cabang kedua s 2(a) APPBA adalah terpakai, iaitu, sebagai 'kes kecederaan atau kerosakan berterusan' kerana berdasarkan fakta-fakta yang tidak bertentangan, khususnya fakta bahawa di dalam lesen yang diberikan, jelas dinyatakan bahawa tarikh terbitannya adalah pada 30 Mac 1992 sementara tarikh tamatnya pada 29 Mac 2012. Oleh itu, lesen tersebut masih sah semasa tindakan tersebut difailkan (lihat perenggan 10).

(2) Selagi lesen tersebut masih sah, ia berterusan tertakluk kepada HAN responden, jika ada, dan hak yang berkenaan dengan tanah tersebut. Oleh itu, cabang kedua s 2(a) terpakai, sebagai kecederaan atau kerosakan berterusan terhadap HAN dan hak responden. Oleh itu, tindakan responden adalah dalam masa yang ditetapkan kerana masa hanya akan berjalan dari 30 Mac 2012 (lihat perenggan 12).

(3) Hujahan perayu sepatutnya dibangkitkan semasa perbicaraan dan tidak menjadi alasan untuk pelupusan ringkasan jika tiada keterangan yang kuat untuk membuktikannya. Dalam erti kata lain, ia adalah satu isu yang boleh dibicarakan. Selanjutnya, tuntutan terhadap tanah HAN oleh responden menzahirkan kausa tindakan yang perlu ditentukan melalui perbicaraan penuh (lihat perenggan 13).

(4) Selagi lesen tersebut masih sah, akan selalu ada ancaman terhadap HAN responden dan hak-haknya yang dengan demikian memberikan hak

kepada mereka untuk kausa tindakan yang sah di bawah cabang kedua s 2(a) dari APPBA (lihat perenggan 14).]

Notes

For cases on claim of customary land, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3452–3463.

For cases on continuation of injury or damage, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2674–2676.

Cases referred to

Ibrahim bin Mohideen Kutty v Timbalan Menteri Dalam Negeri & Ors [2003] 5 MLJ 294, HC (refd)

Ronald Beadle v Hamzah HM Saman & Ors [2007] 1 CLJ 421, CA (refd)

Legislation referred to

Limitation Ordinance (Cap 49)
Public Authorities Protection Act 1948 s 2, 2(a)
Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Appeal No Q-01–84 of 2008 (Court of Appeal, Kuching)

JC Fong (State Legal Officer, State Attorney General's Chambers) in Civil Appeal No 02(i)-50 of 2011(Q) for the appellants.

Tan Thiam Teck (The Law Firm) in Civil Appeal No 02–56–09 of 2011(Q) for the appellant.

Baru Bian (Baru Bian) in Civil Appeal Nos 02(i)-50 of 2011(Q) and 02–56–09 of 2011(Q) for the respondents.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

[1] There are two appeals before us. They were heard together since they involved the same parties and similar questions of law considered by the courts below and argued before us. The parties also agreed that we should hear the appeals together. Thus, for convenience and where appropriate in this judgment we refer to these appeals as Appeal 1 for Appeal No 02(i)-50 of 2011(Q) and Appeal 2 for Appeal No 02–56–9 of 2011(Q).

[2] Further, in this judgment the first and second appellants in Appeal 1 and the appellant in Appeal 2 are referred to collectively as the appellants unless indicated otherwise.

[3] Briefly, the respondents were the plaintiffs. In their statement of claim dated 9 April 2007, the plaintiffs claimed for numerous declaratory reliefs

A including a claim of native customary rights ('NCR') over an area of land in Kampong Long Lamai, Miri, Sarawak and described by the respondents as 'Tana Pengurip' and that of the issuance of a timber licence, Forest Timber Licence No T/0390 ('the licence') by the first and second appellants in Appeal 1 in favour of the appellant in Appeal 2 was null and void in so far is it impaired B the respondents' NCR land.

[4] The appellants, as the defendants, filed an application under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') to strike out the respondents' C case on the ground that limitation had set in.

[5] The learned High Court judge allowed the application and struck out the respondents' claim. He held that the Public Authorities Protection Act 1948 ('the PAPA') and by the Limitation Ordinance of Sarawak ('the LOS') D had barred the respondents' claim. In arriving at his conclusion, the learned High Court judge made a finding of fact that although the licence was granted in 1992, as disclosed in the respondents' pleaded case, they were aware of the existence of the licence and the trespass into their alleged NCR land as early as 1995. Yet action was only commenced in 2007 and no explanation was given E for the delay.

[6] On appeal, the Court of Appeal reversed the decision of the learned High Court judge. The learned judges of the Court of Appeal took the view that although limitation may be a complete answer to a suit, action or proceeding F for remedy, it is not an answer to suit, action or proceeding for declaratory orders. They further held that a declaration as to whether or not the rights of the claimants were infringed was not purely academic despite the absence of any order for compensation or damages payable.

G **[7]** Dissatisfied the appellants sought leave from and duly granted by this court. The question for our consideration thus reads:

> Whether the defence of limitation under section 2 of the Public Authorities Protection Act 1948 and/or Sarawak Limitation Ordinance, is an answer to a suit, action, or proceedings for declaration or declaratory orders.

H

[8] Now, although the question posed deals with the issue of limitation, we are of the view that it is still open for us to consider whether in this case the action of the respondents is statute-barred. After all it depends on the facts of I each case whether or not an action is statute-barred. Accordingly we will first deal with this issue.

[9] Section 2 of the PAPA reads as follows:

> Where, after the coming into force of this Act any suit, action, prosecution or other

proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[10] We do not think it can simply be said that the respondents' cause of action accrued on the date of the licence was granted in 1992 or even in 1995 as found by the learned High Court judge and thus falling within the first limb of s 2(a) of the PAPA. In our view the second limb of the said section should apply, namely, being 'the case of a continuance of injury or damage'. The reason we say so is because based on the uncontroverted facts, in particular the fact that in the licence granted it is clearly stated that the date of issue is on 30 March 1992 while the date of expiry is on 29 March 2012. Therefore the Licence was still valid at the time the action was filed.

[11] We also noted that cl 29(a) of the licence clearly stipulated thus:

This licence is granted without prejudice to the exercise of any right admitted or privilege conceded to the natives under the Forests Ordinance.

During the hearing we drew the attention of the parties to it and all agreed that the licence was subject to the respondents' NCR, if any.

[12] As such we are of the view that as long as the licence remains valid, it continues to be subject to the respondents' NCR, if any, and rights in respect of the land concerned. Accordingly, the second limb of s 2(a) of the PAPA applies, being a continuing injury or damage upon the NCR and rights of the respondents (see: *Ronald Beadle v Hamzah HM Saman & Ors* [2007] 1 CLJ 421 and *Ibrahim bin Mohideen Kutty v Timbalan Menteri Dalam Negeri & Ors* [2003] 5 MLJ 294. The respondents' action is therefore well within time since time would only begin to run from 30 March 2012.

[13] Learned counsel for the appellant in Appeal 2 attempted to impress upon us that his client had not been exercising its rights conferred by the licence for the preceding years and therefore the injury or damage, if any, cannot be said to be continuous. Our simple response to that is surely such an argument must be brought up at trial and not be a ground for summary disposal in the absence of any strong evidence to substantiate the same. In other words it is a triable issue to be determined. Further, the claim to the NCR land

by the respondents does disclose a cause of action that should be determined by a full trial.

[14] Further, we are of the view that as long as the licence remains valid, there is always a threat to the respondents' NCR and rights thereby entitling them to a valid cause of action premised on the second limb of s 2(a) of the PAPA.

[15] Premised on the foregoing reason alone we are of the view that this appeal, being an interlocutory appeal in the first place, should be dismissed and the action should proceed for trial as soon as possible. We therefore decline to answer the question posed since any view we give will be deemed obiter and academic in so far as this case is concerned.

[16] We now invite the parties to address us on the issue of costs.

Appeals dismissed.

Reported by Dzulqarnain Ab Fatar